

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

DANNY A. JOANISSE and
VANCE HAMILTON EGGLESTONE

Plaintiffs

-and-

ELLIOTT THOMPSON BARKER, GARY J. MAIER and
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendants

Proceeding under the *Class Proceedings Act, 1992*

AFFIDAVIT OF LINDSAY LORIMER

I, LINDSAY LORIMER, Solicitor, of the City of Toronto, of the Province of Ontario,
MAKE OATH AND SAY AS FOLLOWS:

1. I am an associate in the firm of Rochon Genova, solicitors for the Plaintiffs, and therefore have knowledge of the matters hereinafter deposed.

Nature of the Action

2. This proposed class action relates to alleged unlawful human experimentation conducted by the Defendants Dr. Elliott Barker and Dr. Gary Maier [hereinafter the "Defendant Doctors"] on patients of the Oak Ridge Division of the Penetang Psychiatric

Hospital in Penetanguishine, Ontario [hereinafter "Penetanguishene"]. Now shown to me and marked as Exhibit "A" is a true copy of the Amended Statement of Claim.

3. This human experimentation is alleged to have taken place at Penetanguishene between 1965 and 1979 is alleged to have involved three distinct "treatment programs" identified as follows:

- 1) Motivation, Attitude, Participation Program ("M.A.P."),
- 2) the Total Encounter Capsule Program (the "Capsule"), and
- 3) Defence Disruptive Therapy ("D.D.T.") [collectively, the "Experimental Programs"].

4. It is alleged that this human experimentation subjected the patients to cruel and inhuman treatment which breached accepted standards of medical ethics. It is alleged that such experiments were intended to break the personalities of patients through the use of brainwashing techniques and mind-altering drugs, including L.S.D. Damages are sought against the Defendant Doctors on the basis of the following causes of action:

- (a) breach of fiduciary duty
- (b) negligence; and
- (c) assault.

5. Allegations are further made against the Defendant Crown in that it failed to protect the patients at Penetanguishene under its care, it failed to adequately supervise the Defendant Doctors, and because it ought never to have allowed such human experimentation to have

taken place. The following causes of action are therefore advanced against the Defendant Crown:

- (a) breach of fiduciary duty; and
- (b) negligence.

Class Definition

6. The Class is defined as all patients who were subjected to the Experimental Programs. More specifically, the Class Definition as set out in the Amended Statement of Claim is as follows:

"(a) All individuals who were incarcerated at Oak Ridge Division of the Penetang Pyschiatric Hospital in Penetanguishene, Ontario [hereinafter "Penetanguishene"] between 1968 and 1979 and who participated in the Motivation, Attitude, Participation Program ("M.A.P.");

(b) All individuals who were incarcerated at Penetanguishene between 1968 and 1979 and who participated in the Total Encounter Capsule Program (the "Capsule"); and

(c) All individuals who were incarcerated at Penetanguishene between 1965 and 1979 and who participated in Defence Disruptive Therapy ("D.D.T.)."

Class Size

7. It is our estimate that approximately 200 patients went through the Experimental Programs, and are therefore putative Class Members.

8. To date we have been contacted by 50 patients who have advised us that they wish to participate in this action if it is certified as a class proceeding. Such persons have contacted us in the absence of any class notice and with only limited media attention. Principally, class members have told us that they learned about this case by word of mouth. Others have told

us that they learned of the case by means of a newspaper article which appeared in the *Toronto Star* or an article which appeared in the *Midland Free Press*. Both articles are attached to my affidavit as Exhibit "B".

Common Issues

9. The Plaintiffs propose that the common issues trial deal with the following common issue of fact:

1. Whether human experimentation took place at Pentaguishene, and if so, what was the nature, duration and extent of that experimentation?

10. The Plaintiffs further propose that the common issue trial deal with the following common issues of law with respect to the liability of the Defendants and the entitlement of the Class to a claim for punitive damages:

2. Whether the Defendant Doctors breached a duty to Class members?
3. Whether the Defendant Crown breached a duty to Class members?
4. Whether the Class is entitled to an award of punitive damages from one or both of the Defendants?

The Common Issues Trial

11. The Plaintiffs anticipate that the common issue trial will last approximately one month. The trial will likely require the full attention of one of the senior lawyers at my office together with at least one associate, one clerk and possibly a law student or two. The common issue trial is likely to be document intense, and to involve a considerable amount of expert evidence. It is the plaintiff's estimate that the costs to the plaintiffs through to the end

of the common issue trial, inclusive of lawyer's fees and disbursements, and in particular, expert fees, would likely be in the range of \$800,000.

12. A significant component of the common issue trial will be to confirm the existence and extent of the Experimental Programs and the extent of the Defendant Crown's knowledge and supervision (or lack thereof) of the Programs. This portion of the trial will likely involve the review of many Crown documents, although it will also involve evidence from a number of material fact witnesses, including testimony from the Defendants.

13. We have not yet had Examinations for Discovery in this action. I expect however that there will be voluminous productions in this case on the common issues and that discovery may take several weeks, and likely consume much lawyer time. In this regard, we have already obtained some documentary production by means of the *Freedom of Information Act* ("F.O.I.") which provides some flavour as to the nature of the likely documentary productions in this case. Now shown to me and marked as Exhibit "C" is a true copy of a selection of documents already obtained in this case pursuant to an F.O.I. request. Also enclosed is a selection of published literature relating to the Experimental Programs.

14. A further significant component of the common issue trial will be expert evidence. It is likely that this case will boil down to a "battle of experts" on the issue of liability/ standard of care. The affidavits of the experts already retained by the Plaintiffs in this case, Dr. Brian Hoffman, and Dr. Colin Ross (which are included in the Plaintiffs' motion record) provide a preliminary overview of the Plaintiffs' position at the common issue trial on liability issues,

and in particular, whether the Defendants' conduct breached a standard of care owed to class members.

15. As is apparent from a review Dr. Hoffman's psychiatric assessments of the two proposed representative plaintiffs, his evidence as to liability/standard of care issues is the same for both representatives plaintiff, and I do verily believe that Dr. Hoffman's evidence would likely be the same for anyone who had gone through the Experimental Programs. I can see no benefit therefore to having Dr. Hoffman repeat this testimony at countless individual trials. In proposing the litigation plan herein, the Plaintiff's have sought therefore to ensure that Dr. Hoffman's evidence, and those of other experts on the common issues, is heard and adjudicated on only once, at the common issue trial.

16. Dr. Brian Hoffman's rate is \$300.00 an hour. Dr. Colin Ross' rate is \$450 (USD) an hour. Other experts the Plaintiffs might retain in this case will likely charge similar fees. I would therefore expect disbursements for experts' fees in this case to be quite substantial, and that there would be substantial savings to the Plaintiffs by having the various experts in this proceeding testify only once.

Economies of Scale

17. If the plaintiffs in this case were to litigate each case, brought by each class member, on an individual basis, from start to finish, our estimate is that each individual trial would likely cost about the same as the proposed common issue trial, ie. \$800,000, and that each individual trial would require the same issues to be litigated over and over again, each

consuming about a month or so of court time, with the same experts presenting the same evidence, repeatedly. Thus, 200 individual trials would collectively consume about 200 months of court time. The proposed litigation plan in this proceeding therefore generates substantial economies of scale and time savings for the court. If the costs of the common issue trial are equitably spread across the claims of each class member, for example, then the litigation costs per class member are only \$4000 per claimant, with considerable time and resource savings to the court and the parties.

Individual Trials

18. If the Plaintiffs are successful at the common issues trial, and assuming this case does not settle thereafter, the Plaintiffs propose to litigate individual damages for class members through a process of individual damages trials.

19. I anticipate that each individual damage trial would last 2-4 days, and would focus on the specific elements of each individual's damage claim. The trial would likely involve a review of that individual's medical records as well as testimony from the individual and possibly from the individual's family and from the individual's health care providers.

20. To better facilitate the process of individual damage assessment we will endeavour to organize class members into categories according to the severity of their injuries, effectively creating a "matrix" for damage claims. We will then proceed with damage assessments for particular plaintiffs who are typical of their group or category in the matrix. It is our view that once a few individual trials have taken place this should establish a "benchmark" range

25. The Plaintiffs propose that all expert reports be exchanged within 1 year of class certification.

26. The Plaintiffs propose that the common issue trial take place within 15 months of class certification.

27. The Plaintiffs propose that any individual damage assessment trials take place immediately following the common issue trial.

Damage Distribution

28. Class members will receive whatever damages are awarded to them pursuant to individual damage assessment trials.

29. If punitive damages are awarded to the Class these will be paid into court. We will then make submissions to the court as to appropriate means for distribution of these damages. Possible distribution schemes might include a *pro rata* distribution, or distribution according to a formula, multiple or ratio of the class member's individual damages, or by means of *cy pres* distribution, or by some other means.

Class Notice

30. Now shown to me and marked as Exhibit "D" is a copy of the proposed official notice in this case.

31. Following class certification, the plaintiff propose that class members be given notice of class certification by means of the following:

- (a) Direct mail notice will be sent to all class members for whom Class Counsel has a mailing address;
- (b) Direct mail notice will also be sent to the last known address of any class members for whom the Defendant Crown has a mailing address, and in this regard, the Plaintiffs request, as part of the certification order that the Defendant Crown search its records and produce a list of the names and address of all class members within its knowledge, possession or control;
- (c) Publication notice will be provided by appropriately worded ads, approved by the court, prominently placed in a weekend edition of the Toronto Star and the Toronto Sun, a daily edition of Today and Metro and a weekly edition of Outreach;
- (d) Class Counsel will mail a copy of the Notice to each of Ontario's psychiatric hospitals, together with a request that the Notice be posted prominently on the premises of each hospital;

(e) A copy of the court approved notice will also be provided by Class Counsel to any person who requests it; and

(f) A copy of the court approved notice will also be posted on Class Counsel's web site.

31. We recommend the *Toronto Star* for notice because of its broad reach across Ontario and the country. Indeed, the *Toronto Star* has by far the highest readership of any newspaper in the country.

32. We recommend the *Toronto Sun*, *Today*, *Metro* and *Outreach* because of the particular demographics of our class. To the extent that class members have been released from Penetanguishene, it is our experience that many of them live in poverty, and indeed may be homeless. The *Toronto Sun's* readership tends to be drawn from lower income groups in Ontario. *Today* and *Metro* are freely available throughout Toronto, and for that reason also tend to be read by lower income groups. As for *Outreach*, by virtue of its mandate, it is particularly well-suited for reaching class members who may be homeless.

Existence of Other Actions

33. To the best of my knowledge there are no other proposed or certified class actions dealing with Penetanguishene although there is a similar class action underway in Ontario dealing with alleged brainwashing experiments at the Prison for Women in Kingston. This case is known as *Dorothy Proctor v. Canada*. The status of this case is described in news

articles which appeared in the *Ottawa Citizen*, copies of which are attached to my affidavit as Exhibit "E".

34. Similarly, the federal government set up a compensation program in 1992 in response to mass tort litigation brought by the victims of brainwashing experiments which were conducted on patients of a Montreal psychiatric clinic during the 1960s (the "Montreal Patients"). The federal government, the U.S. Central Intelligence Agency ("C.I.A.") and a Dr. Ewen Cameron were reported to have been responsible for these experiments. Both the federal government and the C.I.A. ultimately paid compensation to victims of these experiments. Now shown to me and marked as Exhibit "F" are news articles describing the compensation program for the Montreal Patients.

35. There is presently only one individual action outstanding in Ontario dealing with the claims of a patient who went through the Experimental Programs. This action is known as *Smith v. Barker*, Ontario Court File No. 98-CV-161052. My firm is counsel for the plaintiff in this individual action.

Suitability of the Proposed Representative Plaintiffs

36. I believe that the proposed representative plaintiffs can provide Class Counsel with legal instructions, and that neither has a conflict. Both proposed representative plaintiff have been examined, at my firm's request, by Dr. Hoffman, and their mental capacities are discussed in his affidavit attached to this motion record.

37. I am not aware of the existence of any conflict of interest between the proposed representative plaintiffs and the other members of the proposed class.

Experience of Class Counsel

38. I believe that my firm has the capacity and the expertise to see this action through class certification and trial. Rochon Genova is a seven lawyer civil litigation firm which specializes in class actions. Now shown to me and attached to my affidavit as Exhibit "G" is copy of the *curriculum vitae* of the members of my firm's class action team.

39. We are currently have a number of class actions under our carriage. In particular, we are Class Counsel in the nationally certified class action *Wilson v. Servier Canada Inc. et al*, which was certified by Mr. Justice Cumming on September 13, 2000, leave to appeal denied by the Divisional Court on November 22, 2000, leave to appeal to the Supreme Court of Canada. We are also class counsel in *Chadha v. Bayer Inc et al.*, the very first certified price fixing class action in Canada, certified by Mr. Justice Sharpe in July, 1999, certification overturned by the Divisional Court on May 14, 2001, leave to appeal to the Ontario Court of Appeal granted in October, 2001.

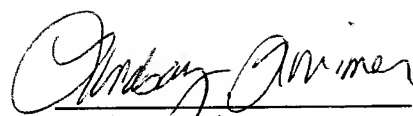
Litigation Plan

40. The above outlines the Plaintiffs' litigation plan for this proceeding. For greater certainty, a proposed litigation plan is attached to my Affidavit as Exhibit "H".

SWORN before me at)
the City of Toronto,)
in the Province of)
Ontario, this 15th day)
of February, 2002)


A Commissioner, etc.

Douglas Lennox


Lindsay Lorimer